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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Civil Action No.: 16-cv-951 (LAK)

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5 DANIEL KLEEGERG, LISA STEIN and AUDREY HAYS,

6
7 Plaintiff,

8 -against-

9
10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER,
11 LLC; CANANDAIGUA NATIONAL CORPORATION d/b/a
12 CANANDAIGUA NATIONAL BANK & TRUST; ELLIOT
13 W. GUMAER, JR.; EBER BROS. & CO., INC., EBER
14 BROTHERS WINE AND LIQUOR CORPORATION;
15 BROS. WINE AND LIQUOR METRO, INC.,
16 EBER-CONNECTICUT, LLC; and WENDY EBER,
17 Defendants.

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1250 Broadway
New York, New York 10001
February 28, 2019
9:45 a.m.

20
21 EXAMINATION BEFORE TRIAL OF WENDY EBER, held at
22 the above-mentioned time and place before ANNMARIE
23 OAKLEY, a Notary Public of the State of New York.

24
25
PLAINTIFF'S
EXHIBIT

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<p style="text-align: right;">Page 2</p> <p>1 2 A P P E A R A N C E S 3 4 BROOK & ASSOCIATES PLLC Attorneys for Plaintiffs 5 100 Church Street, 8th Floor New York, New York 10007 6 7 BY: BRIAN BROOK, ESQ. 8 9 UNDERBERG & KESSLER LLP Attorneys for Defendants 10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC; EBER BROTHERS & CO., INC; EBER BROS. WINE AND LIQUOR 11 CORPORATION; EBER BROS. WINE AND LIQUOR METRO, INC., EBER-CONNECTICUT, LLC; and WENDY EBER 12 50 Fountain Plaza Buffalo, New York 14202 13 14 BY: COLIN RAMSEY, ESQ. 15 JOHN HERBERT, ESQ. (Telephonically) Attorneys for Defendants 16 LESTER EBER and WENDY EBER PO Box 1031 17 Tiburone, California 94920 18 19 CALIHAN LAW PLLC Attorneys for Defendant 20 THE ESTATE OF ELLIOT W. GUMAER 16 Main Street 21 Rochester, New York 14614 22 BY: ROBERT B. CALIHAN, ESQ. 23 24 Also present: Howard Brodsky, videographer 25</p>	<p style="text-align: right;">Page 4</p> <p>1 W. EBER 2 VIDEOGRAPHER: Good morning. Here begins 3 the video recorded testimony of Wendy Eber taken by 4 the plaintiffs in the matter or Daniel Kleeberg et 5 al plaintiffs versus Lester Eber et al defendants, 6 index number 16-cv-9517 (LAK) in the United States 7 District Court Southern District of New York. This 8 deposition is proceeding at Veritext Legal Solution 9 1250 Broadway, Suite 2400, New York, New York 10 10001, on Thursday February 28, 2019 at 11 approximately 9:46. 12 My name is Howard Brodsky and I'm a legal 13 video specialist in association with Veritext Legal 14 Solutions with offices located in New York, New 15 York. The court reporter is AnnMarie Oakley in 16 association with Veritext. Will counsel, please, 17 state their appearances for the record. 18 MR. BROOK: Brian Brook of Brook & 19 Associates, PLLC, for the plaintiffs. 20 MR. RAMSEY: Colin Ramsey from Underberg & 21 Kessler for the Eber defendants. 22 MR. CALIHAN: Rob Calihan from Calihan 23 Law on behalf of the estate of Mike Gumaer. 24 VIDEOGRAPHER: Will remote counsel, 25 please, state his appearance.</p>
<p style="text-align: right;">Page 3</p> <p>1 2 S T I P U L A T I O N S 3 IT IS HEREBY STIPULATED AND AGREED, by and 4 among counsel for the respective parties hereto, 5 that the filing, sealing and certification of the 6 within deposition shall be and the same are waived; 7 8 IT IS FURTHER STIPULATED AND AGREED that 9 all objections, except as to the form of the 10 question, shall be reserved to the time of trial; 11 12 IT IS FURTHER STIPULATED AND AGREED that 13 the within deposition may be signed before a Notary 14 Public with the same force and effect as if signed 15 and sworn to before the court. 16 17 * * * 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 W. EBER 2 MR. HERBERT: John Herbert for Wendy and 3 Lester Eber. 4 THE FOREMAN: Will the court reporter, 5 please, swear in the witness. 6 W E N D Y E B E R, having first been duly sworn by 7 a Notary Public of the State of New York, was 8 examined and testified as follows: 9 EXAMINATION BY MR. BROOK: 10 Q Would you state your name for the record, 11 please. 12 A Wendy Eber. 13 Q Would you state your address for the 14 record, please. 15 A 201 East 80th Street, Apartment 21A, New 16 York, New York 10075. 17 MR. RAMSEY: Like yesterday we're going to 18 read and sign. 19 Q Good morning, Ms. Eber. 20 A Good morning. 21 Q Because we have done this a couple of 22 times with the 30(b)6 depositions I'm going to 23 presume that you know how this works but if you have 24 any questions, please, let me know. I'm going to 25 use the same general definitions as before in terms</p>

<p style="text-align: right;">Page 42</p> <p>1 W. EBER</p> <p>2 Q Yes.</p> <p>3 A Yes.</p> <p>4 Q When did that occur, the negotiation?</p> <p>5 A I don't remember. What year is this?</p> <p>6 Q Again, your email is dated June 2011.</p> <p>7 A I know he claimed he had another offer</p> <p>8 from another company so I don't remember the</p> <p>9 details.</p> <p>10 Q In the notes on the right of that table it</p> <p>11 says, "John Slocum has an employment contract which</p> <p>12 expires in January 2012." Do you see that?</p> <p>13 A Yes.</p> <p>14 Q When was that employment contract executed</p> <p>15 to the best of your recollection?</p> <p>16 A I don't know if I was involved at the</p> <p>17 time. I did note when I was reading the merger</p> <p>18 document there were a lot of contracts in there. He</p> <p>19 may have had one at the time, but I wasn't involved</p> <p>20 in his contract.</p> <p>21 THE WITNESS: Can we take a break.</p> <p>22 MR. BROOK: Sure.</p> <p>23 VIDEOGRAPHER: The time is 10:52. We're</p> <p>24 off the record.</p> <p>25 VIDEOGRAPHER: Time is 11:04. We are on</p>	<p style="text-align: right;">Page 44</p> <p>1 W. EBER</p> <p>2 A It could have been the Teamsters.</p> <p>3 Q Could it have been PBGC?</p> <p>4 A No.</p> <p>5 Q Why do you say that?</p> <p>6 A This isn't something that I recall giving</p> <p>7 to the PBGC.</p> <p>8 Q Do you recall giving a presentation to the</p> <p>9 Teamsters in or about December 2011?</p> <p>10 A I did meet with them a couple of times.</p> <p>11 This could have been to maybe a bank too, trying to</p> <p>12 get a loan from a bank.</p> <p>13 Q Who prepared this presentation?</p> <p>14 A I believe I did.</p> <p>15 Q Did anyone assist you in preparing the</p> <p>16 presentation?</p> <p>17 A I don't remember. It may have been to a</p> <p>18 bank. I'm not sure.</p> <p>19 Q In terms of, you know, the date of</p> <p>20 December 29th of 2017 that's printed on this there</p> <p>21 is -- I got some questions in terms of just how</p> <p>22 documents were generally were prepared for</p> <p>23 production in this case, because that date is after</p> <p>24 this lawsuit was filed; correct?</p> <p>25 A Yes.</p>
<p style="text-align: right;">Page 43</p> <p>1 W. EBER</p> <p>2 the record.</p> <p>3 MR. BROOK: All right. Go to another</p> <p>4 exhibit now. This one is being marked as</p> <p>5 Exhibit 69. It bears Bates EB31025 through</p> <p>6 034.</p> <p>7 (Ten-page document was marked</p> <p>8 as Plaintiff's Exhibit 69 for</p> <p>9 identification.)</p> <p>10 Q Do you recognize this document?</p> <p>11 (Witness reviewing document.)</p> <p>12 A Sort of. I'm confused by this date,</p> <p>13 12/29/2017.</p> <p>14 Q So according to the first page where it</p> <p>15 say Slocum and Sons December 2011 in the middle and</p> <p>16 the bottom left it says 12/29/17.</p> <p>17 A Yes.</p> <p>18 Q Is that the date when you printed this</p> <p>19 document perhaps from Microsoft Power Point?</p> <p>20 A I don't remember. I believe it was</p> <p>21 created December 12, 2011.</p> <p>22 Q Was it a presentation that was given on</p> <p>23 December 12, 2011?</p> <p>24 A I believe so, yes.</p> <p>25 Q What was the presentation given to?</p>	<p style="text-align: right;">Page 45</p> <p>1 W. EBER</p> <p>2 Q Who was involved in reviewing documents</p> <p>3 that were on computers for Slocum and Sons in order</p> <p>4 to respond to document requests in this case?</p> <p>5 A Me.</p> <p>6 Q Anyone else?</p> <p>7 A No.</p> <p>8 Q So do you recall opening up Microsoft Word</p> <p>9 and Microsoft Power Point files and printing those</p> <p>10 out?</p> <p>11 A Yeah, I did print out or send them to Paul</p> <p>12 electronically, our lawyer electronically, yes.</p> <p>13 Q And when you searched for emails did you</p> <p>14 follow the same process of either forwarding the</p> <p>15 email or printing them?</p> <p>16 A Yes.</p> <p>17 Q How did you decide whether to print an</p> <p>18 email or to forward it?</p> <p>19 A I don't recall individual things.</p> <p>20 Q When you saw emails with attachments did</p> <p>21 you print out the attachments as well?</p> <p>22 A I believe I did. I believe I did, yes,</p> <p>23 but I don't know if I did everyone but I believe so.</p> <p>24 Q Prior to this litigation was it your</p> <p>25 practice to regularly print out emails that you sent</p>

12 (Pages 42 - 45)

<p style="text-align: right;">Page 46</p> <p>1 W. EBER</p> <p>2 or received?</p> <p>3 A Sorry?</p> <p>4 Q Before getting involved in with litigation</p> <p>5 and having to look for documents was it your</p> <p>6 practice just in terms of your day-to-day operation</p> <p>7 of the business to print out emails that you sent or</p> <p>8 received?</p> <p>9 A You know, I printed out some emails, yes,</p> <p>10 if they were, I thought something that I thought was</p> <p>11 important or that I wanted to remember to do</p> <p>12 something I would at times print the email.</p> <p>13 Q What did you do with the emails that you</p> <p>14 printed out during the regular course of business</p> <p>15 after you printed them, meaning what you did with</p> <p>16 the hard copies?</p> <p>17 A It depends, sometimes I file them</p> <p>18 sometimes left them on my desk, sometimes I did</p> <p>19 whatever I needed to do with them and I throw them</p> <p>20 in the garbage. It depends on what the email was.</p> <p>21 Q Did you have any particular practice or</p> <p>22 routine when it came to organizing your email inbox?</p> <p>23 A No.</p> <p>24 Q Did you regularly delete emails that you</p> <p>25 received?</p>	<p style="text-align: right;">Page 48</p> <p>1 W. EBER</p> <p>2 wendyefry@Gmail.com.</p> <p>3 Q Why did you start that account?</p> <p>4 A I got married and I, you know, thought it</p> <p>5 would be nice. Sometimes I go by Fry socially</p> <p>6 because of my husband.</p> <p>7 Q Did you legally change your name to Fry?</p> <p>8 A My driver's license says Wendy Eber.</p> <p>9 Q When you filed for your marriage license</p> <p>10 did you request to change your name with the state?</p> <p>11 A Yes.</p> <p>12 Q What is your legal name as a result of</p> <p>13 that?</p> <p>14 A Wendy Fry.</p> <p>15 Q And what is your middle name or initial?</p> <p>16 A P.</p> <p>17 Q Do you ever use your nyc.rr.com email</p> <p>18 account to communicate with individuals relating to</p> <p>19 the Eber businesses?</p> <p>20 A No.</p> <p>21 Q Do you use the nyc.rr.com account to</p> <p>22 communicate with Lester?</p> <p>23 A I don't recall. I may have used it but</p> <p>24 not typically.</p> <p>25 Q Have you used the Gmail account to</p>
<p style="text-align: right;">Page 47</p> <p>1 W. EBER</p> <p>2 A I did delete emails.</p> <p>3 Q Did you also save emails in some way such</p> <p>4 as through an archive or folder system?</p> <p>5 A No, not really. No.</p> <p>6 Q What email service did you use? Was it</p> <p>7 Microsoft Outlook?</p> <p>8 A Yes.</p> <p>9 Q Did you use Microsoft Outlook at all times</p> <p>10 since 2008?</p> <p>11 A Yes.</p> <p>12 Q Did you use Microsoft Outlook for both</p> <p>13 business and personal accounts or only business</p> <p>14 accounts?</p> <p>15 A I have a Gmail account but I have Outlook</p> <p>16 for work.</p> <p>17 Q Since about 2008, I just want to focus on</p> <p>18 the time period from 2008 forward. Please, tell me</p> <p>19 all the different email addresses that you have used</p> <p>20 to send or receive email whether for business or</p> <p>21 personal reasons.</p> <p>22 A From 2008 I have my work email which is</p> <p>23 weber@slocumandsons.com and then I have an email</p> <p>24 address weber4@nyc.rr.com and then I have a Gmail</p> <p>25 account which I started in 2013, or something. It's</p>	<p style="text-align: right;">Page 49</p> <p>1 W. EBER</p> <p>2 communicate with Lester?</p> <p>3 A I don't recall.</p> <p>4 Q Have you used the Gmail account to</p> <p>5 communicate with anyone related to the Eber</p> <p>6 businesses?</p> <p>7 A No.</p> <p>8 Q In responding to Discovery requests in his</p> <p>9 case did you search your nyc.rr.com email account?</p> <p>10 A No.</p> <p>11 Q Did you search your Gmail account?</p> <p>12 A No.</p> <p>13 Q Why not?</p> <p>14 A I don't use that typically to communicate</p> <p>15 with people from work, for work related things.</p> <p>16 Q But when you responded to my questions a</p> <p>17 moment ago you weren't sure if you communicated with</p> <p>18 Lester using those accounts; correct?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 A I don't typically communicate with Lester</p> <p>21 with my -- if I'm communicating with Lester it's for</p> <p>22 work. It's with my work account. If maybe my</p> <p>23 mother emails my father and I'm on it with him about</p> <p>24 a family thing it might be on another account but</p> <p>25 typically I communicate with Lester about work</p>

<p style="text-align: right;">Page 50</p> <p>1 W. EBER</p> <p>2 related thing with my work account.</p> <p>3 Q And you're -- how confident are you about</p> <p>4 the fact that you probably have not communicated</p> <p>5 with Lester through your personal email accounts at</p> <p>6 any point since 2008?</p> <p>7 MR. RAMSEY: Form.</p> <p>8 A What?</p> <p>9 Q Are you saying that you remember that you</p> <p>10 didn't communicate with Lester using your personal</p> <p>11 account at that time?</p> <p>12 MR. RAMSEY: Form.</p> <p>13 A I don't typically use -- if I'm going to</p> <p>14 communicate with Lester I usually talk to him. It's</p> <p>15 usually a conversation. I call him all the time. I</p> <p>16 call him a couple of times a day or we talk by phone</p> <p>17 or I see him in the office. You know, that's how I</p> <p>18 communicate with Lester.</p> <p>19 Q Have any of your friends or family members</p> <p>20 who are not parties to this lawsuit communicated</p> <p>21 with you about this lawsuit or the issues in it?</p> <p>22 A I have spoken to my mother, yes.</p> <p>23 Q What did you and your mother discuss about</p> <p>24 this lawsuit?</p> <p>25 A Not a lot of details, just it's more her</p>	<p style="text-align: right;">Page 52</p> <p>1 W. EBER</p> <p>2 Q What is your understanding as to when</p> <p>3 Lester had that conversation with him?</p> <p>4 A When?</p> <p>5 Q Yes.</p> <p>6 A My understanding was that, um, Dan</p> <p>7 Kleeberg had a conversation with Mark Stein and Mark</p> <p>8 Stein said he had learned about the Article 9 sale</p> <p>9 and that he told Danny about it and then Danny told</p> <p>10 Lester about it and then Lester told me about his</p> <p>11 conversation with Danny.</p> <p>12 Q What did Lester tell you about that</p> <p>13 conversation?</p> <p>14 A I believe it was before Sally died.</p> <p>15 Q What do you recall Lester telling you</p> <p>16 about what Dan said in response to him informing him</p> <p>17 about the transaction?</p> <p>18 A Danny was well aware of the monies that</p> <p>19 Lester had been lending into the company and</p> <p>20 understood all these third-party creditors,</p> <p>21 specifically the PBGC.</p> <p>22 Q Just let me clarify. You're talking about</p> <p>23 what Lester told you Dan had said at the time? I'm</p> <p>24 not asking what you think Dan would do. I'm asking</p> <p>25 you specifically what you recall Lester telling you</p>
<p style="text-align: right;">Page 51</p> <p>1 W. EBER</p> <p>2 concern and it's more the hurt feelings. Were a</p> <p>3 family and I went to Danny's wedding in 1974. I</p> <p>4 went to Lisa's wedding. I went to Audrey's wedding.</p> <p>5 We celebrate Passover together. We celebrated</p> <p>6 Thanksgiving together. We celebrated Rosh Hashanah</p> <p>7 together for the last, for Lester 60- 70 years, and,</p> <p>8 um, it's more about just how hurtful it is and those</p> <p>9 type of emotional feelings.</p> <p>10 Q When you got married to Eric Fry were any</p> <p>11 of my clients in attendance?</p> <p>12 A They were. They came to my wedding.</p> <p>13 Q All of them?</p> <p>14 A Lisa was there. Sally was there. Danny</p> <p>15 was there, and Danny's son was there.</p> <p>16 Q Was Audrey Hays there?</p> <p>17 A Audrey was not there. Her husband was</p> <p>18 very sick at the time. She couldn't make it.</p> <p>19 Q When is the first time that you recall</p> <p>20 discussing with Dan Kleeberg the fact that the trust</p> <p>21 no longer owned Eber Connecticut?</p> <p>22 A I didn't have that conversation with him.</p> <p>23 Q Not before this lawsuit was filed?</p> <p>24 A No. Lester had that conversation with</p> <p>25 him.</p>	<p style="text-align: right;">Page 53</p> <p>1 W. EBER</p> <p>2 that Dan had said in response to him informing him</p> <p>3 of the transaction.</p> <p>4 A That he understood. I mean, I don't -- I</p> <p>5 think what I was trying to say is he understood that</p> <p>6 Lester had been putting in a lot of money into the</p> <p>7 company, loaning money into the companies to save</p> <p>8 the companies and he understood that and that, you</p> <p>9 know.</p> <p>10 Q Was anything about this conversation ever</p> <p>11 documented?</p> <p>12 MR. RAMSEY: Form.</p> <p>13 A Well, there was an email from Danny to</p> <p>14 Lester which basically Danny was asking Lester for</p> <p>15 to find him another job and to continue paying him a</p> <p>16 consulting fee from the company and, um, he, you</p> <p>17 know, he knew Lester was loaning money into the</p> <p>18 company so if Lester had to loan the money in he</p> <p>19 didn't necessarily need the money but he would like</p> <p>20 to continue to get the consulting fee so, um.</p> <p>21 Q So that email was after the conversation</p> <p>22 that he had with Lester?</p> <p>23 A No. I think that was before. That was</p> <p>24 in, I think, 209 when he was looking to get, looking</p> <p>25 for money to be paid as a consultant.</p>

<p style="text-align: right;">Page 54</p> <p>1 W. EBER</p> <p>2 Q My question is focused on whether there</p> <p>3 was any documentation, whether just email</p> <p>4 memorializing it or notes or anything like that that</p> <p>5 was made about the conversation that Lester said he</p> <p>6 had with Dan Kleeberg in or around 2014 at the time</p> <p>7 or afterwards not something that you think supports</p> <p>8 it before.</p> <p>9 MR. RAMSEY: Form. Go ahead.</p> <p>10 A I didn't document it. I don't know if</p> <p>11 Lester documented it. I didn't document that</p> <p>12 phonecall or that conversation.</p> <p>13 Q Did Lester explain to you how the topic</p> <p>14 came up?</p> <p>15 A No. I think that Danny and Lester spoke</p> <p>16 very frequently about lots of subjects, especially</p> <p>17 after the company closed or wound down and, you</p> <p>18 know, also Danny was a supplier of Connecticut so we</p> <p>19 did business with him and sold his products.</p> <p>20 Q I'm sorry. Can you -- I think you may</p> <p>21 have said this but was this conversation that Lester</p> <p>22 said he had with Dan before or after Sally died?</p> <p>23 A I believe it was before Sally died but</p> <p>24 I -- yeah. I believe it was before and he</p> <p>25 understood. I don't think Danny was angry. I don't</p>	<p style="text-align: right;">Page 56</p> <p>1 W. EBER</p> <p>2 the pension benefit so then her lawyer sued Eber</p> <p>3 Brothers and then he got into negotiations with the</p> <p>4 PBGC and Eber Brothers.</p> <p>5 Q This was all before the Alexbay</p> <p>6 transaction; right?</p> <p>7 A No. This was after -- well, he signed</p> <p>8 where he misrepresented that they didn't have a</p> <p>9 Quadro, that was before the Alexbay.</p> <p>10 Q What do you mean by a Quadro?</p> <p>11 A Qualified Domestic Relations Order, which</p> <p>12 designated that Gail Kleeberg was entitled to half</p> <p>13 of his pension plan.</p> <p>14 Q What is your basis for saying that he made</p> <p>15 that representation with intentional falsity?</p> <p>16 MR. RAMSEY: Form.</p> <p>17 A Because he signed a document that said</p> <p>18 that he didn't have one when, in fact, he did have</p> <p>19 one.</p> <p>20 Q So it's your view that if someone signs a</p> <p>21 document that says something then they are</p> <p>22 responsible for ensuring the accuracy of everything</p> <p>23 that's in that document?</p> <p>24 MR. RAMSEY: Form. He testified at this</p> <p>25 own deposition.</p>
<p style="text-align: right;">Page 55</p> <p>1 W. EBER</p> <p>2 think he -- you know, nothing comes up in my mind</p> <p>3 that Danny was upset about anything because my</p> <p>4 understanding was that Danny knew that Lester had</p> <p>5 been lending money into the company, and I had</p> <p>6 conversations with Danny about the pension</p> <p>7 obligations with the PBGC and he was aware of that</p> <p>8 liability.</p> <p>9 Q When was the conversation that you had</p> <p>10 with Dan regarding the PBGC?</p> <p>11 A Um, do you have the interrogatories?</p> <p>12 Because you know this is -- they're all detailed in</p> <p>13 the interrogatories.</p> <p>14 MR. RAMSEY: Just whatever your best</p> <p>15 recollection is today. Whatever your best</p> <p>16 recollection is today.</p> <p>17 A I had several conversation with Danny</p> <p>18 about the PBGC. His wife sued Eber -- excuse me.</p> <p>19 His ex-wife, Gail Kleeberg sued Eber Brothers</p> <p>20 because he falsified a document saying that he</p> <p>21 didn't have a Quadro to get his pension plan and so</p> <p>22 he wasn't paying his ex-wife the pension, the</p> <p>23 pension she was entitled to through the Quadro so at</p> <p>24 that point there was no administrator on the pension</p> <p>25 plan to change the designation of the ex-wife to get</p>	<p style="text-align: right;">Page 57</p> <p>1 W. EBER</p> <p>2 THE WITNESS: Right. He testified to this</p> <p>3 at his own deposition.</p> <p>4 Q Have you ever signed a document that</p> <p>5 contained any factual inaccuracies?</p> <p>6 A I don't recall. I mean, I may have, yes,</p> <p>7 signed something.</p> <p>8 Q Has Lester signed any documents that</p> <p>9 contain factual inaccuracies that you're aware of?</p> <p>10 MR. RAMSEY: Form.</p> <p>11 A May have, I don't know all the specifics.</p> <p>12 I'm just --</p> <p>13 MR. RAMSEY: Wait. Wait for a question.</p> <p>14 Q I wants to focus on your conversations</p> <p>15 with Dan Kleeberg after the transfer of Eber Metro</p> <p>16 to Alexbay. During any of those conversations with</p> <p>17 Dan Kleeberg did you tell Dan Kleeberg that PBGC was</p> <p>18 trying to collect money from Eber Connecticut?</p> <p>19 A I didn't use those words but I did use the</p> <p>20 words that the companies had a pension liability and</p> <p>21 the companies were responsible for that pension</p> <p>22 liability which is going back to why -- just stay</p> <p>23 with me here. Eber Brothers had a lawyer</p> <p>24 representing it with the PBGC. Dan Kleeberg wanted</p> <p>25 to use Eber Brothers lawyer to represent him with</p>

15 (Pages 54 - 57)

<p style="text-align: right;">Page 58</p> <p>1 W. EBER</p> <p>2 the PBGC because Gail Kleeberg's lawyer had</p> <p>3 contacted the PBGC about Gail's Kleeberg's situation</p> <p>4 about not receiving her benefit. So all of those</p> <p>5 things I had discussed with Dan so Dan knew we were</p> <p>6 talking to the PBGC about the liability there. He</p> <p>7 knew that.</p> <p>8 Q And did you tell anything to Dan about the</p> <p>9 specifics of what PBGC was trying to find out in</p> <p>10 terms of the information about Eber Connecticut?</p> <p>11 A What do you mean?</p> <p>12 Q Well, PBGC was trying to get a lot of</p> <p>13 information from you about Eber Connecticut and what</p> <p>14 its financials were and its operations; correct?</p> <p>15 A Well, at some points they were and at</p> <p>16 other points we were talking negotiating with them.</p> <p>17 It went on for a very long time.</p> <p>18 Q I'm asking about the inquiries regarding</p> <p>19 Eber Connecticut. I understand there's other things</p> <p>20 there. Did you tell Dan Kleeberg about the fact</p> <p>21 that PBGC was making inquiries about Eber</p> <p>22 Connecticut's finances?</p> <p>23 A I may have. I don't remember the</p> <p>24 specifics. I remember him saying that he called the</p> <p>25 PBGC without an attorney and spoke with an attorney</p>	<p style="text-align: right;">Page 60</p> <p>1 W. EBER</p> <p>2 A We were always trying to negotiate with</p> <p>3 the PBGC to determine what we could pay, afford to</p> <p>4 pay.</p> <p>5 Q So my question is --</p> <p>6 A So, yes.</p> <p>7 Q -- PBGC took the position during those</p> <p>8 negotiations -- I'm sorry. Eber Connecticut took</p> <p>9 the position during the negotiation with PBGC that</p> <p>10 Eber Connecticut was not legally obligated to make</p> <p>11 payments to the pension plan of Eber Brothers Wine</p> <p>12 and Liquor Corp.; correct?</p> <p>13 MR. RAMSEY: Form.</p> <p>14 A There was negotiations. We always knew</p> <p>15 that we had to pay something. There were liens on</p> <p>16 Connecticut.</p> <p>17 Q Well, you fought against the lien on</p> <p>18 Connecticut; correct?</p> <p>19 A Well, originally they put a lien on</p> <p>20 Connecticut. There's -- I'm not an ERISA lawyer.</p> <p>21 Q I'm not asking you --</p> <p>22 A Well, I think this is an important point.</p> <p>23 There are things called statutory liens, which I</p> <p>24 don't know if you took this class in law school or</p> <p>25 not but these things just arise so they don't even</p>
<p style="text-align: right;">Page 59</p> <p>1 W. EBER</p> <p>2 there and I said, Danny, you need a lawyer to speak</p> <p>3 to them. You can't just call them up, and so that's</p> <p>4 what we got into this whole conversation about</p> <p>5 having Eber Brothers represent Danny.</p> <p>6 Q I really want to try to get this done</p> <p>7 today so I would really appreciate if you answered</p> <p>8 my question about a minute earlier, so let's stay</p> <p>9 focused on that. So when you might have spoken with</p> <p>10 Dan about PBGC making inquiries about Eber</p> <p>11 Connecticut's finances and operations did you</p> <p>12 indicate to Dan Kleeberg that Eber Connecticut was</p> <p>13 trying to avoid making payments to PBGC to fund the</p> <p>14 pension benefit?</p> <p>15 A What?</p> <p>16 Q Well, Eber Connecticut wasn't willingly</p> <p>17 making payment to PBGC for a period of years;</p> <p>18 correct?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 A The companies could not afford to make</p> <p>21 payments. Yes, we were not making payments.</p> <p>22 Q And Eber Connecticut took the position</p> <p>23 that it did not have to make payments to PBGC; isn't</p> <p>24 that correct?</p> <p>25 MR. RAMSEY: Form.</p>	<p style="text-align: right;">Page 61</p> <p>1 W. EBER</p> <p>2 have to put a lien on it. These are theoretical</p> <p>3 liens. Right. So there were liens. And I don't</p> <p>4 understand all the legalese to it but there were</p> <p>5 liens that came on and then a lien came off and a</p> <p>6 lien went back on.</p> <p>7 MR. RAMSEY: All right. You answered</p> <p>8 question.</p> <p>9 A I mean it's a very --</p> <p>10 Q Did you tell Dan Kleeberg that Eber</p> <p>11 Connecticut was taking the position that it did not</p> <p>12 have to fund the pension benefits as a result of the</p> <p>13 Alexbay transaction?</p> <p>14 A No. I didn't tell him. I don't believe I</p> <p>15 told him something like that because I always</p> <p>16 believed that --</p> <p>17 MR. RAMSEY: You answered the question.</p> <p>18 Q I'm going to focus to you on this Exhibit</p> <p>19 69, page three of it. See the bulletpoints? The</p> <p>20 third one says, "While we're losing money we have a</p> <p>21 plan in place to become profitable this year. As a</p> <p>22 result of our efforts are projecting our EBITDA to</p> <p>23 go from negative \$535,000 to positive 305,000 by May</p> <p>24 of 2012." Do you see that?</p> <p>25 A Yes.</p>

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<p style="text-align: right;">Page 62</p> <p>1 W. EBER</p> <p>2 Q And EBITDA is different than net income;</p> <p>3 correct?</p> <p>4 A Correct.</p> <p>5 Q What does EBITDA stand for?</p> <p>6 A Earning before interest, tax,</p> <p>7 depreciation.</p> <p>8 Q And amortization?</p> <p>9 A Amortization.</p> <p>10 Q Did Eber Connecticut keep track of what</p> <p>11 its EBITDA was?</p> <p>12 A I believe so, for the bank.</p> <p>13 Q Were there financial statements prepared</p> <p>14 that included lines on what the EBITDA was?</p> <p>15 A You mean audited financial statements?</p> <p>16 Q Not necessarily, maybe just a simple</p> <p>17 spreadsheet or regular emails saying what the EBITDA</p> <p>18 was.</p> <p>19 A Yes. I think we had convenience around</p> <p>20 these types of, um, convenience which was related to</p> <p>21 the EBITDA, yes.</p> <p>22 Q So why in this presentation were you</p> <p>23 pointing out what the EBITDA was rather than talking</p> <p>24 about net income numbers?</p> <p>25 A I think this was for the bank. I think</p>	<p style="text-align: right;">Page 64</p> <p>1 W. EBER</p> <p>2 Q And was it taxed as a distributor as well?</p> <p>3 A What kind? You mean state tax?</p> <p>4 Q What kind of state taxes were imposed on</p> <p>5 Eber Connecticut as a result of its business as a</p> <p>6 distributor?</p> <p>7 A You mean sales tax?</p> <p>8 Q Did it pay sales taxes?</p> <p>9 A I believe there are some -- there's, like,</p> <p>10 gallonage tax but I don't know if that relates to</p> <p>11 this tax number here.</p> <p>12 Q Were there sales taxes?</p> <p>13 A I'm not sure. I'm not sure. I don't do</p> <p>14 the taxes so I don't know specifically. I don't</p> <p>15 know if -- this is an LLC and I think this tax</p> <p>16 number -- I'm not sure necessarily relates to, um,</p> <p>17 the tax. I think it's more the depreciation and the</p> <p>18 interest that would be an add back here. Those</p> <p>19 would be the factors really impacting this number.</p> <p>20 Q So the interest was primarily interest on</p> <p>21 bank loans; is that right?</p> <p>22 A Yes.</p> <p>23 Q Was there any other significant interest</p> <p>24 expense?</p> <p>25 A I don't think so. I think it all related</p>
<p style="text-align: right;">Page 63</p> <p>1 W. EBER</p> <p>2 this presentation was for a bank, trying to get a</p> <p>3 bank loan.</p> <p>4 Q And so why was EBITDA being used with the</p> <p>5 banks instead of net income.</p> <p>6 A Just to show -- I think the banks look at</p> <p>7 EBITDA.</p> <p>8 Q What is your understanding as to why they</p> <p>9 use EBITDA instead of net income?</p> <p>10 A It's before interest and tax and</p> <p>11 depreciation. I still think EBITDA may have been</p> <p>12 negative in 2012.</p> <p>13 Q It says that right there. I wasn't asking</p> <p>14 about that. For the EBITDA numbers that Eber</p> <p>15 Connecticut prepared for the bank, or otherwise,</p> <p>16 were all of the taxes that were paid by Eber</p> <p>17 Connecticut taken out or were there some taxes that</p> <p>18 remained there in there as expenses effecting the</p> <p>19 EBITDA number?</p> <p>20 MR. RAMSEY: Form. Go ahead.</p> <p>21 A I don't know.</p> <p>22 Q So as far as Eber Connecticut's business</p> <p>23 is it fair to say it had to be licensed by the State</p> <p>24 of Connecticut to be a distributor?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 65</p> <p>1 W. EBER</p> <p>2 to loans.</p> <p>3 Q I want to focus your attention on page</p> <p>4 nine of this. Actually, I'm sorry page eight. So</p> <p>5 refers here to cost savings efforts, identify the</p> <p>6 following opportunities, and it refers to three</p> <p>7 things there. Is it correct to understand this as</p> <p>8 saying these are opportunities for further cost</p> <p>9 savings or that these are the three items that are</p> <p>10 not things that had not already taken place by that</p> <p>11 point?</p> <p>12 A So this is something from December. This</p> <p>13 is fiscal year 2012. It may have been something we</p> <p>14 were in the process of implementing because it would</p> <p>15 have been during our fiscal 2012 year. So it was</p> <p>16 probably in process.</p> <p>17 Q So finance contracted out resulting in</p> <p>18 \$100,000 savings. What is that referring to?</p> <p>19 A That was going back to Wally being hired</p> <p>20 as a consultant as opposed to Dave Dean who was a</p> <p>21 full-time employee who had FICA and health care and</p> <p>22 all that stuff.</p> <p>23 Q When was Wally given the title of CFO?</p> <p>24 Was it at some point later?</p> <p>25 A Yeah. Well, he would start out as a</p>

<p style="text-align: right;">Page 182</p> <p>1 W. EBER</p> <p>2 Q Under the terms of the will if Lester had</p> <p>3 died in 2016 who would have gotten control of Eber</p> <p>4 Brothers and Co. Inc. stock?</p> <p>5 A It's irrelevant.</p> <p>6 Q Is it irrelevant when you're determining</p> <p>7 the interpretation of what the intent of the will</p> <p>8 was?</p> <p>9 MR. RAMSEY: Form.</p> <p>10 A The intent of the will, it's right in</p> <p>11 there that says Lester while he is living is running</p> <p>12 the company.</p> <p>13 Q It doesn't say that.</p> <p>14 A It says Lester's running the company.</p> <p>15 MR. RAMSEY: We're going to take five</p> <p>16 minutes here.</p> <p>17 VIDEOGRAPHER: The time is 15:52. We are</p> <p>18 off the record.</p> <p>19 VIDEOGRAPHER: The time is 15:57. We are</p> <p>20 on the record.</p> <p>21 Q As secretary of Eber Brothers and Co. Inc.</p> <p>22 you are in control of the stock book and ledger for</p> <p>23 the company; correct?</p> <p>24 A Correct.</p> <p>25 Q Where is that located?</p>	<p style="text-align: right;">Page 184</p> <p>1 W. EBER</p> <p>2 A At the time I wasn't sure.</p> <p>3 Q So did you ever tell the bank that you had</p> <p>4 found the stock book?</p> <p>5 A Basically what I said was I would look for</p> <p>6 it. I think it was like in June and then I said I</p> <p>7 would look for it over Fourth of July weekend and I</p> <p>8 never heard back from the bank and then it was like</p> <p>9 in a black hole. No one said anything back to me.</p> <p>10 Q So you were waiting for the bank to tell</p> <p>11 you, yes, please look for it?</p> <p>12 A Right, but it's really irrelevant because</p> <p>13 it wouldn't be -- well, whatever.</p> <p>14 Q Why do you say it's irrelevant?</p> <p>15 A Because we have the stock books. We have</p> <p>16 them.</p> <p>17 Q Okay. Had you told your lawyer that you</p> <p>18 did not have the stock book?</p> <p>19 MR. RAMSEY: Form. Stop. Communications</p> <p>20 with your counsel.</p> <p>21 MR. BROOK: Not when he disclosed it.</p> <p>22 Let's look at this here. This is Exhibit 40</p> <p>23 previously marked. It's an email from Jim Pazzona</p> <p>24 to a lawyer for CNB stating, "Dear Melissa, I trust</p> <p>25 you received my voicemail of yesterday afternoon</p>
<p style="text-align: right;">Page 183</p> <p>1 W. EBER</p> <p>2 Q Where in Rochester?</p> <p>3 A 95 Allens Creek Road.</p> <p>4 Q How long has it been at that location for?</p> <p>5 A Since we moved. The company moved from</p> <p>6 155 Paragon Drive.</p> <p>7 Q Okay, and was it in Lester Eber's personal</p> <p>8 office or in another part of the office space there?</p> <p>9 A I'm not exactly sure where. It probably</p> <p>10 was between the two. It might have been in his</p> <p>11 personal office. They're connected.</p> <p>12 Q Did you have some difficulty in locating</p> <p>13 that stock ledger in about mid '17?</p> <p>14 MR. RAMSEY: Form.</p> <p>15 A We were, um -- I told the bank or what we</p> <p>16 basically said -- I wasn't exactly sure where it was</p> <p>17 and I was going up to Rochester over Fourth of July</p> <p>18 and I said I would look for it then.</p> <p>19 Q Why did you tell them that you would look</p> <p>20 for the stock book? What was the reason for the</p> <p>21 inquiry.</p> <p>22 A The bank had requested.</p> <p>23 Q What was your understanding as to what the</p> <p>24 bank wanted to do with the stock book?</p> <p>25 MR. RAMSEY: Form.</p>	<p style="text-align: right;">Page 185</p> <p>1 W. EBER</p> <p>2 regarding your inquiry as to the corporate stock</p> <p>3 book of Eber Brothers and Co. Inc. I am fairly</p> <p>4 confident that they do not have it, however to be</p> <p>5 sure Wendy will be in Rochester over the Fourth of</p> <p>6 July weekend and will double check."</p> <p>7 A Yes. This is incorrect.</p> <p>8 Q What about this is incorrect?</p> <p>9 A That -- I didn't say I'm confident that</p> <p>10 they don't have it. I didn't -- I said I would look</p> <p>11 for it is what I said. I don't necessarily know</p> <p>12 where it is. I will go look for it. I'm going to</p> <p>13 be up there Fourth of July weekend and then I didn't</p> <p>14 here anything.</p> <p>15 Q So you're saying you did not authorize</p> <p>16 your lawyer to tell CNB that he was confident that</p> <p>17 you didn't have the stock book?</p> <p>18 A No, I didn't say that. I just said this</p> <p>19 is incorrect.</p> <p>20 Q So you did authorize him to --</p> <p>21 MR. RAMSEY: No. This is not a waiver of</p> <p>22 privilege here. Whatever he said, he said.</p> <p>23 But that doesn't mean a waive of any privilege.</p> <p>24 She's saying that this is inaccurate.</p> <p>25 Q Now, was this email here forwarded to you?</p>

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1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 Civil Action No.: 16-cv-9517 (LAK)

-----x

5 DANIEL KLEEGER, LISA STEIN and AUDREY HAYS,

7 Plaintiff,

8 -against-

9
10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER,
11 LLC; CANANDAIGUA NATIONAL CORPORATION d/b/a
12 CANANDAIGUA NATIONAL BANK & TRUST; ELLIOT
13 W. GUMAER, JR.; EBER BROS. & CO., INC., EBER
14 BROTHERS WINE AND LIQUOR CORPORATION;
15 BROS. WINE AND LIQUOR METRO, INC.,
16 EBER-CONNECTICUT, LLC; and WENDY EBER,
17 Defendants.

-----x

16 1250 Broadway
17 New York, New York 10001
18 June 28, 2019
19 9:42 a.m.

20
21 CONTINUED VIDEOTAPED DEPOSITION OF WENDY EBER
22 held at the above-mentioned time and place before
23 ANNMARIE OAKLEY, a Notary Public of the State of
24 New York.
25

<p style="text-align: right;">Page 219</p> <p>1 2 APPEARANCES 3 4 BROOK & ASSOCIATES PLLC Attorneys for Plaintiffs 5 100 Church Street, 8th Floor New York, New York 10007 6 7 BY: BRIAN BROOKS, ESQ. 8 9 UNDERBERG & KESSLER LLP Attorneys for Defendants 10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC; EBER BROTHERS & CO., INC; EBER BROS. WINE AND LIQUOR 11 CORPORATION; EBER BROS. WINE AND LIQUOR METRO, INC., EBER-CONNECTICUT, LLC; and WENDY EBER 12 50 Fountain Plaza Buffalo, New York 14202 13 14 BY: COLIN RAMSEY, ESQ. 15 16 CALIHAN LAW PLLC Attorneys for Defendant 17 THE ESTATE OF ELLIOT W. GUMAER 16 Main Street 18 Rochester, New York 14614 19 BY: ROBERT B. CALIHAN, ESQ. 20 21 Also present: PHIL GALUBERSON, videographer 22 DAN KLEEBERG, telephonically 23 24 25</p>	<p style="text-align: right;">Page 221</p> <p>1 W. EBER 2 financially interested in the outcome. Counsel 3 and all present in the room will now state 4 their appearances and affiliations for the 5 record. 6 MR. BROOK: Brian Brook of Brook & 7 Associates, counsel for plaintiff is here, and 8 one of my clients, Daniel Kleeberg, is on the 9 telephone. 10 MR. RAMSEY: Colin Ramsey from Underberg & 11 Kessler for the Eber defendants. 12 MR. CALIHAN: Rob Calihan on behalf of 13 Calihan Law representing the estate of Elliot 14 Gumaer. 15 VIDEOGRAPHER: Will the record, please, 16 swear in the witness. 17 W E N D Y E B E R, having been previously sworn by 18 a Notary Public of the State of New York, was 19 examined and testified as follows: 20 EXAMINATION BY MR. BROOK: 21 Would you state your name for the record, please. 22 A Wendy Eber. 23 Q Would you state your address for the 24 record, please. 25 A 201 East 80th Street, Apartment 21A, New</p>
<p style="text-align: right;">Page 220</p> <p>1 W. EBER 2 VIDEOGRAPHER: Good morning, we are going 3 on the record at 9:42 a.m. on June 28, 2019. 4 Please, note that the microphones are sensitive 5 and may pick up whispers, private conversation 6 and cellular interference. Please, turn off 7 all cellphones or place them away from the 8 microphones as they can interfere with the 9 deposition audio. Audio and video recording 10 will continue to take place unless all parties 11 agree to go off the record. This is media unit 12 one, day two of the video recorded deposition 13 of Wendy Eber in the matter of Daniel Kleeberg 14 versus Lester Eber et al. filed in the United 15 States District Court Southern District of New 16 York, Civil Action number 16-cv-9517(LAK) 17 MR. BROOK: 9517. 18 VIDEOGRAPHER: This deposition is being 19 held at Veritext, located at 1250 Broadway, New 20 York, New York. My name is Phil Glauberson 21 from the firm Veritext and I am the 22 videographer. The court reporter is Annmarie 23 Oakley from the firm Veritext. I am not 24 authorized to administer an oath. I am not 25 related to any party in this action, nor am I</p>	<p style="text-align: right;">Page 222</p> <p>1 W. EBER 2 York, New York 10075. 3 Q Good morning, Ms. Eber. 4 A Good morning. 5 Q I want to start out by asking if, you know 6 we had three days before in these depositions, if 7 there's any reason why you may think that I may need 8 to go over how this deposition is going to work or 9 how you should be addressing my questions, if you 10 don't understand and things like that? 11 MR. RAMSEY: The grounds rule. 12 Q Do we need to go over the ground rules? 13 A Okay, you can. 14 Q Well, the court reporter is taking down 15 everything that we say so the most important thing 16 is we try not to talk over each other. If I ask you 17 a question if there's any part of it that you don't 18 understand you should say that to me because if you 19 answer the question I'm going to assume that you 20 understood it. 21 A Okay. 22 Q And those are the, I think, two of the 23 basics. We have a limited amount of time here but 24 breaks don't count for that so if you need to take a 25 break you can do so, just say it. The only thing I</p>

<p style="text-align: right;">Page 323</p> <p>1 W. EBER</p> <p>2 MR. BROOK: Who at Eder Goodman.</p> <p>3 A It was also between Pat Dalton. I think</p> <p>4 the lawyers were involved in it as well.</p> <p>5 Q So you think the lawyers might have wanted</p> <p>6 you to get the right of first refusal?</p> <p>7 A No. I'm saying the lawyers were involved</p> <p>8 in the whole thing so the whole negotiation as well.</p> <p>9 Q So are you -- but what does that have to</p> <p>10 do with who at Eder Goodman insisted that you get</p> <p>11 this right of first refusal?</p> <p>12 A I don't remember exactly.</p> <p>13 MR. BROOK: This is Exhibit 121 and</p> <p>14 jumping forward this is an email dated March 9,</p> <p>15 2012, Bates number EB31199.</p> <p>16 (EB31199 was marked as</p> <p>17 Plaintiff's Exhibit 121 for</p> <p>18 identification.)</p> <p>19 Q This is an email that you printed out;</p> <p>20 correct?</p> <p>21 A Yes.</p> <p>22 Q And it's one that you sent to Mike Gumaer;</p> <p>23 correct?</p> <p>24 A Yes.</p> <p>25 Q And the subject says it's a forward of</p>	<p style="text-align: right;">Page 325</p> <p>1 W. EBER</p> <p>2 the foreclosure action so he knew what you were</p> <p>3 talking about here?</p> <p>4 A I don't remember the exact dates because</p> <p>5 this is, you know, seven years ago here but I know</p> <p>6 that Mike was aware of all of the loans that Lester</p> <p>7 had put into the company. He was aware of all of</p> <p>8 the liabilities that the company faced and he was,</p> <p>9 he knew generally what was going on in the company.</p> <p>10 Q My question is about the foreclosure</p> <p>11 action.</p> <p>12 A I don't recall exactly when he found out</p> <p>13 but he was aware.</p> <p>14 MR. BROOK: Let's mark this as Exhibit</p> <p>15 122, Bates EB26652.</p> <p>16 (EB26652 was marked as</p> <p>17 Plaintiff's Exhibit 122.)</p> <p>18 Q This is sent four days later on March 13,</p> <p>19 2012 from Mike to you; correct?</p> <p>20 A Right.</p> <p>21 Q And he says, "Wendy, We'll talk at 4 p.m.</p> <p>22 I'm not in a position to discuss in any depth the</p> <p>23 Alex Bay matter as I learned of the matter yesterday</p> <p>24 afternoon in the email from Underberg." Let me stop</p> <p>25 there. Do you know what email from Underberg he was</p>
<p style="text-align: right;">Page 324</p> <p>1 W. EBER</p> <p>2 something January Eber CT. Do you see that?</p> <p>3 A Yes.</p> <p>4 Q Where's the forwarded text?</p> <p>5 A I don't know.</p> <p>6 Q Did you delete that.</p> <p>7 A No. I mean, I didn't delete anything. I</p> <p>8 haven't deleted anything from the time you sued us</p> <p>9 so, I mean, I don't know if this may have been a</p> <p>10 printout. I don't know.</p> <p>11 Q In the email you said, "Mike, Please</p> <p>12 confirm that you have a conference call today at 4</p> <p>13 p.m. with Glenn and that he will be in Rochester on</p> <p>14 Tuesday and Wednesday next week. You need to speak</p> <p>15 with Rick Hawks." message importance is high;</p> <p>16 correct?</p> <p>17 A Yes.</p> <p>18 Q Why was it that you said that Mike Gumaer</p> <p>19 needed to speak with Rick Hawks?</p> <p>20 A I think this is the time of the</p> <p>21 foreclosure or the filing of the foreclosure</p> <p>22 documents and there were numerous phonecalls, I</p> <p>23 think, and meetings that week regarding the</p> <p>24 foreclosure.</p> <p>25 Q Had you already apprized Mike Gumaer of</p>	<p style="text-align: right;">Page 326</p> <p>1 W. EBER</p> <p>2 referring to there?</p> <p>3 A I'm not certain. I mean, I do have a copy</p> <p>4 of it.</p> <p>5 Q I'm asking if you know. When you say</p> <p>6 you're not certain what are you referring to?</p> <p>7 MR. RAMSEY: You're not certain what he's</p> <p>8 referring to?</p> <p>9 THE WITNESS: No.</p> <p>10 Q Do you believe you asked Underberg to</p> <p>11 forward him a copy of the Alex Bay Complaint?</p> <p>12 A I may have. I just don't remember.</p> <p>13 Q And so is it fair to say that you had not</p> <p>14 discussed the Alex Bay foreclosure action with Mike</p> <p>15 Gumaer prior to Monday, March 12, 2012?</p> <p>16 MR. RAMSEY: Form.</p> <p>17 A Well, he was well aware of the loans that</p> <p>18 Lester put into --</p> <p>19 Q Focus on the foreclosure action not the</p> <p>20 loans themselves.</p> <p>21 A Right. He was well aware but I'm not sure</p> <p>22 exactly when he was notified of the foreclosure</p> <p>23 action but he knew about the loans and he knew about</p> <p>24 the financial situation of the company and all the</p> <p>25 liabilities out there that Lester was financing</p>

<p style="text-align: right;">Page 327</p> <p>1 W. EBER</p> <p>2 everything.</p> <p>3 Q Just so we're clear, because you gave a</p> <p>4 long answer there, are you disputing the statement</p> <p>5 here that according to Mike Gumaer he learned of the</p> <p>6 matter the day before the date of this email in an</p> <p>7 email from Underberg?</p> <p>8 MR. RAMSEY: Form.</p> <p>9 A He learned of the foreclosure?</p> <p>10 Q Yes. Do you dispute that?</p> <p>11 A Well, that's what's written here.</p> <p>12 Q Do have any basis to dispute that?</p> <p>13 A I don't know.</p> <p>14 Q Next line says, he wrote, "Hawks will be</p> <p>15 interested in knowing as will I what will be the</p> <p>16 status of the Eber trust with respect to Eber assets</p> <p>17 held in the trust. You may wish to have someone</p> <p>18 from Underberg on hand to address these issues." and</p> <p>19 then it says "on the survive" which I think means</p> <p>20 surface, "it looks like Lester is moving against the</p> <p>21 trust to which he is a cotrustee." Do you see that?</p> <p>22 A Yes.</p> <p>23 Q Can you think of anything other than what</p> <p>24 surface, what word he might have meant if it wasn't</p> <p>25 surface in that last sentence?</p>	<p style="text-align: right;">Page 329</p> <p>1 W. EBER</p> <p>2 think, board meetings. I had numerous call with</p> <p>3 him.</p> <p>4 Q So I'm asking, I'm try together</p> <p>5 understand, do you recall anything specifically that</p> <p>6 you told him in terms of new information that he</p> <p>7 didn't already have to allay his concern that on the</p> <p>8 surface it looked like Lester was moving against the</p> <p>9 trust of which he was a cotrustee.</p> <p>10 MR. RAMSEY: Form.</p> <p>11 A He's stating that that's what it looks</p> <p>12 like and that's what it was. Lester was moving</p> <p>13 against company. Yes.</p> <p>14 MR. BROOK: This is going to be 123. This</p> <p>15 is an email and an attachment sent on March 12,</p> <p>16 2012 from you to, looks like, Marino Fernandez</p> <p>17 and Mike Gumaer.</p> <p>18 (March 12, 2012 email was</p> <p>19 marked as Plaintiff's Exhibit</p> <p>20 123 for identification.)</p> <p>21 Q Do you see that.</p> <p>22 A Yes.</p> <p>23 Q It looks like you had scanned or someone</p> <p>24 had scanned for you a term sheet with CNB about Eber</p> <p>25 Connecticut, well, not just a term sheet but a</p>
<p style="text-align: right;">Page 328</p> <p>1 W. EBER</p> <p>2 A I don't know.</p> <p>3 Q Do you recall discussing this concern with</p> <p>4 Gumaer?</p> <p>5 A Yes. Yes.</p> <p>6 Q What did say to him about it?</p> <p>7 A Well, you know, just as I have said</p> <p>8 throughout this deposition we -- and actually this</p> <p>9 week we, you know, that March 13th week we had many,</p> <p>10 many calls about, you know, all the monies that</p> <p>11 Lester had loaned into the company. The --</p> <p>12 Q He was already well aware of that though;</p> <p>13 right?</p> <p>14 A Who?</p> <p>15 Q You just said that Mike Gumaer was already</p> <p>16 well aware of the loans and everything and he still</p> <p>17 had these concerns, so I'm asking you to focus on</p> <p>18 what you said after this point in response to his</p> <p>19 concerns.</p> <p>20 A Right. That we talked about what Lester</p> <p>21 was doing. I had a lot of conversations with him</p> <p>22 about the loans that were secured loans, all the</p> <p>23 debts that Eber Brothers had, the continued legacy</p> <p>24 liabilities, all that information, the financial</p> <p>25 distress of the companies and he was -- we had, I</p>	<p style="text-align: right;">Page 330</p> <p>1 W. EBER</p> <p>2 signed and executed term sheet to Mike Gumaer and</p> <p>3 Marino Fernandez. Why were you doing that?</p> <p>4 A I don't know. I don't remember.</p> <p>5 Q And Marino Fernandez asked -- just to make</p> <p>6 sure we're on the same page, Marino Fernandez was</p> <p>7 the lawyer that was retained by Eber Brothers Wine &</p> <p>8 Liquor Corp. to represent it in the foreclosure</p> <p>9 action; is that right?</p> <p>10 A Yes.</p> <p>11 Q Can you recall what he was doing looking</p> <p>12 at this bank loan?</p> <p>13 A I don't remember.</p> <p>14 Q Can you recall what the relevance was of</p> <p>15 the bank loan to anything that was going on at the</p> <p>16 time?</p> <p>17 MR. RAMSEY: Form.</p> <p>18 A No. I mean that we were --</p> <p>19 MR. RAMSEY: Hold on. If you remember you</p> <p>20 remember. Don't speculate.</p> <p>21 A No.</p> <p>22 MR. BROOK: All right. We're up to 124.</p> <p>23 Now in is email with Bates number 26650 with an</p> <p>24 attachment, Bates number 26650 and the</p> <p>25 attachment with Bates numbers 26650A and B.</p>

<p style="text-align: right;">Page 331</p> <p>1 W. EBER</p> <p>2 (Bates 26650A to 26650B was</p> <p>3 marked as Plaintiff's Exhibit</p> <p>4 124 for identification.)</p> <p>5 A Yes.</p> <p>6 Q So this is the consent form by which the</p> <p>7 board of Eber Brothers Wine & Liquor, at the time</p> <p>8 was just you and Mike Gumaer, consented to the</p> <p>9 transfer of stock from Alex Bay to satisfy the</p> <p>10 obligations to Alex Bay; correct?</p> <p>11 A Yes.</p> <p>12 Q Is it correct that this is a document that</p> <p>13 was drafted by Underberg Kessler?</p> <p>14 A Looks like it was.</p> <p>15 Q Why was Underberg Kessler drafting a</p> <p>16 resolution for Eber Brothers Wine & Liquor Corp.?</p> <p>17 MR. RAMSEY: Form.</p> <p>18 A I don't know.</p> <p>19 Q And this email was sent by someone at</p> <p>20 Underberg Kessler, looking at the second one before</p> <p>21 you forwarded it, sent from somebody named Marcy</p> <p>22 McQue (phonetic) from Marcy Davis McQue. I'm not</p> <p>23 sure I follow that. Do you know who that is?</p> <p>24 A Where?</p> <p>25 Q In the email that you were forwarding, so</p>	<p style="text-align: right;">Page 333</p> <p>1 W. EBER</p> <p>2 this email who was a lawyer representing Eber</p> <p>3 Brothers Wine & Liquor Corp.?</p> <p>4 A On this email that is correct.</p> <p>5 Q Was there a lawyer for Eber Brothers Wine</p> <p>6 & Liquor Corp. that every reviewed this document?</p> <p>7 A Maybe. I don't remember.</p> <p>8 Q Who did you think that lawyer might have</p> <p>9 been?</p> <p>10 A Marino, Mike Gumaer was also a lawyer too.</p> <p>11 Q I want to ask you some questions about</p> <p>12 your communications with Marino Fernandez now that</p> <p>13 the court has ruled that's something that is subject</p> <p>14 to Discovery. When did you first speak with Marino</p> <p>15 Fernandez about the foreclosure action?</p> <p>16 A I don't remember the exact date. I don't</p> <p>17 remember.</p> <p>18 Q Do you recall what you discussed? About</p> <p>19 what our needs were?</p> <p>20 A I don't -- I mean, that's many years ago.</p> <p>21 It's, like, seven years ago. I don't really</p> <p>22 remember all the details.</p> <p>23 Q What, if any, questions did you ask Marino</p> <p>24 Fernandez to look into?</p> <p>25 A I don't remember. Like, specific</p>
<p style="text-align: right;">Page 332</p> <p>1 W. EBER</p> <p>2 looking down about a third way of the page, it's</p> <p>3 from somebody named Marcy McQue. It looks like</p> <p>4 she's an administrative assistant. Do you know her</p> <p>5 personally?</p> <p>6 A No.</p> <p>7 Q And she was sending this to you, to</p> <p>8 Lester, to Glenn Sturm, to David Belt; right? Do</p> <p>9 you see that?</p> <p>10 A Yes.</p> <p>11 Q And copying several lawyers at Underberg &</p> <p>12 Kessler; is that right?</p> <p>13 A Yes.</p> <p>14 Q So there were a lot of lawyers on this</p> <p>15 email; correct?</p> <p>16 A There's a lot of lawyers on this email.</p> <p>17 Yes.</p> <p>18 Q But Marino Fernandez was not one of the</p> <p>19 lawyers on this; correct?</p> <p>20 A He's not on this email, no.</p> <p>21 Q And you never sent him this document to</p> <p>22 review?</p> <p>23 MR. RAMSEY: Form.</p> <p>24 A I don't remember.</p> <p>25 Q And so is it correct there was no one on</p>	<p style="text-align: right;">Page 334</p> <p>1 W. EBER</p> <p>2 conversations and stuff?</p> <p>3 Q Or just general issues. Was there</p> <p>4 anything in particular that you wanted Marino</p> <p>5 Ferandez to do to protect the rights of Eber</p> <p>6 Brothers Wine & Liquor Corp.?</p> <p>7 A I mean, sitting here I just don't</p> <p>8 remember. I don't recall.</p> <p>9 Q What did he tell you his qualifications</p> <p>10 were to do this kind of corporate work?</p> <p>11 MR. RAMSEY: Form.</p> <p>12 A Well, he was a lawyer that was recommended</p> <p>13 to us by Paul Keneally. So it's a small community</p> <p>14 in Rochester. Everyone, kind of, knows each other</p> <p>15 on the legal front so I thought he was a good</p> <p>16 choice.</p> <p>17 Q Did Marino Fernandez offer any opinions</p> <p>18 about the foreclosure action?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 MR. CALIHAN: Form.</p> <p>21 A As far as what?</p> <p>22 MR. BROOK: What's the objection?</p> <p>23 MR. CALIHAN: A formal opinion or --</p> <p>24 Q Did he offer any opinions on whether Eber</p> <p>25 Brothers Wine & Liquor Corp. should consent to</p>

<p style="text-align: right;">Page 335</p> <p>1 W. EBER</p> <p>2 Lester's request to take the shares of Eber Metro in</p> <p>3 full satisfaction of the debts?</p> <p>4 A If we should?</p> <p>5 Q Yes.</p> <p>6 A There weren't any alternatives. I mean,</p> <p>7 Brian, there's no money to pay for anyone here.</p> <p>8 There are no alternatives. So, yeah, I mean it's</p> <p>9 just -- this is, kind of, a situation where we</p> <p>10 waived all of our defenses and that was suggested by</p> <p>11 him.</p> <p>12 Q He suggested waiving all your defenses?</p> <p>13 A There weren't any defenses. There's no</p> <p>14 money here. There's no money to pay Marino, let</p> <p>15 alone, you know, do anything. Who's going to pay</p> <p>16 for the defenses? Yeah.</p> <p>17 Q It was a decision to waive defenses out of</p> <p>18 the concern of the cost; is that right?</p> <p>19 MR. RAMSEY: Form.</p> <p>20 A Well, just resources, cost, there's no</p> <p>21 defenses. Yeah. I mean, yes, he supported that.</p> <p>22 Q And did you get anything in writing from</p> <p>23 him in terms of any legal opinions?</p> <p>24 MR. RAMSEY: Form.</p> <p>25 A A written legal opinion?</p>	<p style="text-align: right;">Page 337</p> <p>1 W. EBER</p> <p>2 Q And in terms of your discussions with</p> <p>3 either Marino Fernandez or Glenn Sturm was there any</p> <p>4 discussion about how the transfer of Eber Metro to</p> <p>5 Alex Bay would effect the shareholders and the value</p> <p>6 of the shareholders in Eber Brothers Wine & Liquor</p> <p>7 Corp.?</p> <p>8 MR. RAMSEY: Form.</p> <p>9 A Say that again.</p> <p>10 Q Let me rephrase. Was there any discussion</p> <p>11 about how the transfer of Eber Metro to Alex Bay</p> <p>12 would effect the value of the shares of Eber</p> <p>13 Brothers Wine & Liquor Corp. for the shareholders?</p> <p>14 A With?</p> <p>15 Q With either Glenn Sturm or Marino</p> <p>16 Fernandez?</p> <p>17 A You know, sitting here today I don't</p> <p>18 recall. I'm sure there were conversations. I just</p> <p>19 don't remember, like, a specific conversation.</p> <p>20 MR. RAMSEY: Okay. Then you answered the</p> <p>21 question.</p> <p>22 Q And so when you say you're sure it makes</p> <p>23 it a little confusing. Do you recall any general</p> <p>24 conversation or what their conclusion was about the</p> <p>25 value of the shares and how that would be effected?</p>
<p style="text-align: right;">Page 336</p> <p>1 W. EBER</p> <p>2 Q Any written legal opinion, even just an</p> <p>3 email?</p> <p>4 A No. I don't know if -- I don't think</p> <p>5 there was a written opinion. No.</p> <p>6 Q And who was on the discussion with him</p> <p>7 when he apparently gave you the opinion about waving</p> <p>8 all the defenses?</p> <p>9 MR. RAMSEY: Form.</p> <p>10 A You have the minutes right, so there was a</p> <p>11 meeting, I think, in --</p> <p>12 Q Just the board meeting, then with Lester</p> <p>13 and Mike Gumaer?</p> <p>14 A And I believe he was on one of the calls</p> <p>15 too. We had many calls and he was on the call,</p> <p>16 Gumaer was on the call. Then I called Gumaer, Mike</p> <p>17 at a later date. I spoke with Marino later dates.</p> <p>18 I don't know if you have the minutes or not.</p> <p>19 MR. RAMSEY: All right. You answered the</p> <p>20 question.</p> <p>21 Q Did you consult with any other lawyers,</p> <p>22 besides Marino Fernandez, about how the transfer of</p> <p>23 Eber Metro would affect Eber Brothers Wine & Liquor</p> <p>24 Corp.?</p> <p>25 A I may have talked to Glenn about it.</p>	<p style="text-align: right;">Page 338</p> <p>1 W. EBER</p> <p>2 A I just don't. You know, there was a lot</p> <p>3 of things going on I don't remember. The companies</p> <p>4 were insolvent.</p> <p>5 MR. RAMSEY: You answered the question.</p> <p>6 You don't remember. The answer is okay.</p> <p>7 MR. BROOK: Let's go to Exhibit 125.</p> <p>8 Start off by asking -- well, let me put the</p> <p>9 Bates number. It appears to be part of an</p> <p>10 email with Bates number EB31212 and an</p> <p>11 attachment of EB31212A.</p> <p>12 (EB31212 and EB31212A was</p> <p>13 marked as Plaintiff's Exhibit</p> <p>14 125 for identification.)</p> <p>15 Q What happened to the top part of this</p> <p>16 email?</p> <p>17 A I don't know.</p> <p>18 MR. BROOK: We'll request that a complete</p> <p>19 copy of this be provided or that the redaction</p> <p>20 log be provided that explains why a document</p> <p>21 that has already been produced is being</p> <p>22 produced in redacted form, and I just want to</p> <p>23 request that I am requesting it for the record.</p> <p>24 Q So because one of the problems here is</p> <p>25 this doesn't have a date or anything on it but I</p>

<p style="text-align: right;">Page 339</p> <p>1 W. EBER</p> <p>2 will -- hopefully if you need a second to read it</p> <p>3 but hopefully you can answer some questions on it</p> <p>4 anyway. Do you know who Jim is in this email?</p> <p>5 A I believe it's Jim Frizano. (phonetic)</p> <p>6 Q And you're sending to him a proforma</p> <p>7 analysis of how the trust should be distributed; is</p> <p>8 that right?</p> <p>9 A Yes.</p> <p>10 Q Why was this prepared?</p> <p>11 A Well, this was prepared because</p> <p>12 Canandaigua wanted to distribute the trust and they</p> <p>13 sent out, like, their -- how they were going to</p> <p>14 distribute it, and one of the items that they didn't</p> <p>15 take into consideration was that Erica Stein was</p> <p>16 getting distributions from the trust, which were</p> <p>17 supposed to be subtracted from Lisa Stein's portion</p> <p>18 of the trust.</p> <p>19 Q Okay. So you were providing different</p> <p>20 numbers for how you believe the assets should be</p> <p>21 distributed versus what CNB had initially proposed?</p> <p>22 A For the -- not anything to do with the</p> <p>23 Eber Brothers equity, only the marketable securities</p> <p>24 so the Eber, you notice, was taken out. I didn't do</p> <p>25 anything with that. This was just on the account</p>	<p style="text-align: right;">Page 341</p> <p>1 W. EBER</p> <p>2 Q Subsequent to sending this proforma</p> <p>3 analysis to Jim Frizano did you make any further</p> <p>4 adjustments to what you thought the distribution of</p> <p>5 marketable assets should be?</p> <p>6 A What do you mean?</p> <p>7 Q Well, after, whenever you sent this to Jim</p> <p>8 Frizano, did you find any errors in here or find</p> <p>9 anything that you think needed to changed in how it</p> <p>10 would effect the ultimate distribution?</p> <p>11 A I think this was the only -- I don't</p> <p>12 remember if this was the final. I think this was</p> <p>13 the final one. I mean, I don't know if they used</p> <p>14 this one. They used something else I think.</p> <p>15 Q But this is what you believe they should</p> <p>16 have done; is that fair?</p> <p>17 A I believe so, yes.</p> <p>18 Q In your email you also mention something</p> <p>19 in this second paragraph, "Since the Woods Oviatt</p> <p>20 bills are being paid by the trust include charges</p> <p>21 from the SDNY litigation, it's only fair that our</p> <p>22 legal bills are paid as well by the trust." Did you</p> <p>23 ever take any further steps to try to get legal</p> <p>24 bills paid for by the trust?</p> <p>25 A I don't believe so, no. I did note that</p>
<p style="text-align: right;">Page 340</p> <p>1 W. EBER</p> <p>2 balance of the marketable cash and, you know, traded</p> <p>3 stocks and things like that.</p> <p>4 Q Okay. So it was in your view appropriate</p> <p>5 to change the distribution of marketable securities</p> <p>6 and other liquid assets but not to change anything</p> <p>7 having to do with Eber Brothers & Co. stock; is that</p> <p>8 right?</p> <p>9 A Right. So you will see, like, the bank</p> <p>10 said that, like, Lisa and Danny should get \$113,000</p> <p>11 but -- well, Lisa should get \$113,000 but see she</p> <p>12 should have been adjusted out the monies that were</p> <p>13 advanced to Erica, about \$75,217, that were advanced</p> <p>14 to Erica. So, you know, her adjusted distribution</p> <p>15 on the marketable security should been about</p> <p>16 \$50,566.</p> <p>17 Q Who created this proforma analysis?</p> <p>18 A I worked on it.</p> <p>19 Q Did anyone else help you with it?</p> <p>20 A I may have had some help with it.</p> <p>21 Q Who may have helped you with it?</p> <p>22 A I don't remember.</p> <p>23 Q Are you proficient on how to use Microsoft</p> <p>24 Excel yourself?</p> <p>25 A Yes. I have a business degree.</p>	<p style="text-align: right;">Page 342</p> <p>1 W. EBER</p> <p>2 they were -- there were a lot of bills from Woods</p> <p>3 Oviatt that were taken out of the trust, yeah.</p> <p>4 Q And do you know whether it's correct that</p> <p>5 that included the SDNY litigation bills, that those</p> <p>6 were actually taken from the trust?</p> <p>7 A They may have been. They may have been.</p> <p>8 I don't remember at this time. I don't remember if</p> <p>9 I wrote this or not. You know, I would have gotten</p> <p>10 it from -- I think there's was an allocation of</p> <p>11 something and I was going through that report or</p> <p>12 that document and I saw this so that's why I would</p> <p>13 have asked for this but --</p> <p>14 Q You saw Woods Oviatt bills; right?</p> <p>15 A Yeah.</p> <p>16 Q Do you know whether those were bills for</p> <p>17 the SDNY litigation or for the surrogates court</p> <p>18 proceeding?</p> <p>19 A I'm not sure. I don't know.</p> <p>20 Q Did you ever see the Woods Oviatt bills?</p> <p>21 A For the trust or the SDNY?</p> <p>22 Q For whatever was paid for by the trust.</p> <p>23 A There were some details in some documents</p> <p>24 I believe that did have some -- you could see the</p> <p>25 lawyers billings, so there were some bills I think.</p>